STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN GREGORY PALAZZOLO,

Defendant-Appellant.

UNPUBLISHED
August 28, 2007

No. 269098
Wayne Circuit Court
LC No. 05-010220-01

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion is used to accomplish the sexual penetration). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 6 to 15 years' imprisonment for each count. Defendant appeals as of right. We affirm.

Defendant first argues that he is entitled to a new trial on the basis of three pieces of newly discovered evidence. A trial court's ruling on a motion for a new trial based upon newly discovered evidence is reviewed for an abuse of discretion, while its findings of fact are reviewed for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Although defendant preserved this argument with respect to one of the pieces of newly discovered evidence, his claims of error concerning the other pieces of evidence are unpreserved and reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Carines, supra* at 763-764.

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *Cress, supra* at 692.

The first piece of allegedly newly discovered evidence is from James Waitman, an acquaintance of defendant. According to Waitman, he visited the victim and defendant's acquaintance, Tony Alfonso, at a motel shortly after the victim left defendant's house and was

told by the victim and Alfonso that they were going to set up defendant and accuse him of raping the victim even though they knew that such an allegation was not true. Waitman's statement is not newly discovered evidence, as defendant was aware of the setup before trial and testified to the setup at trial. The evidence is also cumulative, given that defendant testified at length concerning Waitman's statement to him, namely, that defendant was being set-up by the victim and Alfonso. Waitman's proposed testimony at a retrial would therefore not offer any information concerning the setup that the trial court had not already heard.

Even if this was newly discovered evidence, defendant's argument still fails because he cannot establish that a different result is probable on retrial. In evaluating defendant's motion for a new trial based on newly discovered evidence, the trial court found that defendant held the victim captive at his house against her will, forced the victim to smoke crack and committed several coerced acts of sexual penetration against the victim. Indeed, the trial court expressly noted, "[d]efendant's testimony of consensual sex was not believable. The proposed testimony of Waitman that the complainant and another person plotted to falsely accuse the complainant [sic] of raping her would have not been persuasive . . . . Neither Waitman's affidavit or [sic] defendant's motion for a new trial offer any possible motive or reason for the complainant to falsely accuse the defendant . . . . Waitman [sic] proposed testimony would not have impacted the court's decision. It would not render a different result on a retrial." Hence, the trial court considered and rejected the newly discovered testimony, concluding that defendant's setup theory was not credible. Thus, the new evidence would not have likely rendered a different result on retrial, and we cannot say that the trial court's findings of fact constitute clear error or its ultimate decision on defendant's motion constituted an abuse of discretion. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992) (in reviewing a trial court's determination on a motion for a new trial based on newly discovered evidence, due regard must be given to the trial court's superior opportunity to appraise the credibility of the witnesses).

The second piece of new evidence consists of statements taken from women found in defendant's house that they were not being held captive by defendant. The women were discovered when police executed a search of defendant's house. Assuming the evidence is newly discovered and not cumulative, defendant's argument still fails because, had defendant used reasonable diligence, he could likely have discovered and produced the evidence at trial. The search of defendant's house took place in August 2005. Defendant's trial did not conclude until February 2006. Had defendant exercised reasonable diligence pretrial, he could have hired an investigator and discovered the evidence. Finally, and most importantly, the new evidence does not make a different result probable on retrial. The fact that there were women found in defendant's house in August 2005 who were not being held captive in no way precludes a finding that the victim was held captive in September 2005. Defendant's claim that the outcome of the trial would likely have been different with this new evidence is not persuasive.

The third and final piece of new evidence comes in the form of a statement from a Ronald Harris, who told defendant's private investigator that he did not help Alfonso carry the victim out of defendant's house; rather, he gave Alfonso and the victim a ride. Defendant claims that Harris's statement is significant because it contradicts Alfonso's statement to the police that Alfonso asked Harris to assist him in getting the victim out of the house because she did not look well. Even if Harris's statement contradicts Alfonso's statement, defendant cannot establish that the new evidence is likely to lead to a different outcome at trial. In light of the evidence as a

whole, the impact of this particular piece of evidence is quite minor. Consequently, defendant is not entitled to a new trial because he cannot establish that any of the newly discovered evidence would likely have led to a different outcome at trial. *Cress, supra*.

We also reject defendant's argument that the trial court erred in denying his motion for a new trial on the basis that the verdict was allegedly against the great weight of the evidence. This Court reviews a trial court's decision with respect to a motion for a new trial for an abuse of discretion. *Cress, supra* at 691.

The determination whether a verdict was against the great weight of the evidence depends on whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Musser,* 259 Mich App 215, 218-219; 673 NW2d 800 (2003). A court should consider whether to overturn the verdict with great reserve and with all presumptions running against the grant of a new trial, and the court may not substitute its view of witness credibility for the fact-finder's determination of credibility. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. *Musser, supra* at 219. Unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the fact-finder could not believe it, or contradicted indisputable physical facts or defied physical realities, the court must defer to the fact-finder's determination. *Musser, supra* at 219.

Defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b). A defendant is guilty of third-degree CSC if (1) he engages in sexual penetration with another person, and (2) force or coercion is used to accomplish the sexual penetration. MCL 750.520d(1)(b). To establish the force or coercion necessary to a charge of third-degree criminal sexual conduct, a prosecutor need not show that the defendant overcame the victim. *People v Carlson,* 466 Mich 130, 140; 644 NW2d 704 (2002), on rem 467 Mich 870; 651 NW2d 919 (2002). Rather, the necessary force must be that which allows the accomplishment of sexual penetration when absent the force the penetration would not have occurred. *Carlson, supra* at 140. The prohibited force encompasses the use of force to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes. *Carlson, supra* at 140.

In this case, the victim's testimony alone established the evidence necessary to support the convictions. The victim testified that she was held captive at defendant's house for ten days, that defendant and others told her that she was not permitted to leave and, if she tried to leave or contact the authorities, she would be physically harmed. According to the victim, defendant forced her to smoke crack and have sex with various men (including defendant) in the house in exchange for money or crack, which in turn would be given to defendant. And, although defendant testified that the victim consented to having sex with him, the victim was adamant that her sexual encounters with defendant were not consensual and she was under the influence of crack, which defendant forced her to smoke. The victim testified to being afraid for her life and complying with defendant's directives out of fear. In light of the victim's testimony, there was evidence before the trial court establishing the elements of third-degree CSC.

As defendant correctly points out, parts of the victim's account are less than clear, omit details, and seemingly contradict other portions of her testimony. Indeed, the victim admitted that her memory concerning certain details, like the amount of time that passed between each sexual encounter or the description of each man she had sex with, was hazy (perhaps from the drugs). Despite the fact that the victim's memory was less than ideal, she did testify that she was certain that defendant forced her to have sex with him on multiple occasions. Accordingly, we find that the force/coercion element of third-degree CSC was met and the victim's impeachment did not rise to the level of exceptional circumstances necessary to repudiate the verdict. *Lemmon, supra* at 643, 647 (conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial; if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the fact-finder could not believe it, the credibility of witnesses is for the fact-finder). The trial court did not abuse its discretion in determining that the verdict should not be overturned.

Defendant next argues that his waiver of his right to a jury trial was invalid and the trial court was biased in favor of the prosecution. This Court reviews the validity of a defendant's jury trial waiver for clear error. *People v Taylor*, 245 Mich App 293, 305 n 2; 628 NW2d 55 (2001). Defendant's unpreserved claim of judicial bias is reviewed for plain error affecting his substantial rights. *Carines, supra* at 763-764. To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Carines, supra* at 763-764.

A defendant charged with a felony has a constitutional right to a jury trial. *People v Bearss*, 463 Mich 623, 629-630; 625 NW2d 10 (2001). A defendant may, however, with prosecutor and court consent, be given the option of waiving this right. MCL 763.3; *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). To assure that the right to a jury trial is properly protected, MCR 6.402(B) provides:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

The trial court complied with the requirements of MCR 6.204(B) by informing defendant of his right to a jury trial, and ascertaining that defendant understood that right and knowingly and voluntarily waived it. The record developed in this case is substantially similar to records which were found by this Court to be sufficient to establish that the defendants knowingly, intelligently, and voluntarily waived their right to jury trials. See, e.g., *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993); *People v Reddick*, 187 Mich App 547, 550; 468 NW2d 278 (1991). Consequently, defendant understood his right to have a jury trial and he knowingly, intelligently, and voluntarily waived the right.

Defendant's next claim is that he was denied his right to a fair trial because of the trial court's bias in favor of the victim and the prosecution. Absent actual personal bias or prejudice against either a party or a party's attorney, a judge will not be disqualified. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). A party who challenges a judge for bias must

overcome a heavy presumption of judicial impartiality. *Wells, supra* at 391. A judge's opinions formed during the course of litigation on the basis of facts introduced or events that occur during the proceedings do not generally constitute bias or partiality unless deep-seated favoritism or antagonism demonstrates that the exercise of fair judgment is impossible. *Wells, supra* at 391. Critical comments or hostility towards counsel or the parties is generally insufficient to demonstrate bias or partiality. *Wells, supra* at 391.

We reject the arguments of judicial bias set forth in both of defendant's appellate briefs. First, allowing the victim to take a brief break from testifying did not constitute judicial bias. Immediately prior to the break, the victim was being questioned extensively concerning the details of the sexual acts defendant forced her to partake in. The victim became apparently distraught, stating at one point, "I can't do this, I can't." The prosecutor asked the trial court if it would grant a brief recess and the court agreed, but not before noting its dissatisfaction, stating, "I don't see a reason for a recess here. I'm going to give you a moment here, ma'am, but, you know, there's nothing difficult about testifying here. There's no jury here, you're in a courtroom setting. And I'm not going to be very patient with this, Mr. [prosecutor], you know. So we're going to take about five, ten minutes, here, you talk to her." Granting the brief recess, especially in light of the admonishing words that accompanied it, in no way constituted bias in favor of the prosecution.

Second, defendant alleges that the judge showed his bias when he told defense counsel to "move on" while defense counsel was suggesting to the victim that she was improperly communicating with the officer in charge while testifying. The judge's statement, however, constituted an attempt to move the testimony along and avoid wasting time on tangential matters. It was not improper, nor did it suggest bias. Additionally, the trial court's reference to perjury during Travis Read's testimony, though not clear as to its origins, was not a reflection of bias for or against defendant. At most, it was a reflection of the trial judge's credibility determinations, which were his to make.

Third, the judge's comment that crack is addictive does not constitute the judge acting as an expert witness in favor of the prosecution. No one at trial disputed the effects of crack, or even that the victim smoked crack throughout her stay at defendant's house, as the issue at trial was whether the victim's crack-smoking and sexual encounters were voluntary.

Fourth, the judge did not exhibit bias at the pretrial bond matter when he stated that, after reviewing the preliminary examination transcript, he believed for purposes of setting bond, that defendant was a danger to the community and a predator and the victim was credible. In determining bond, it was necessary for the trial court to assess defendant's level of dangerousness. The court considered the victim's preliminary examination testimony to aid it in that analysis. The court's findings were in the context of a pretrial bond matter and do not suggest that the trial court was biased or would be biased at trial.

In light of the heavy presumption of judicial impartiality, none of the aforementioned instances, alone or taken together, were sufficient to establish judicial bias. Accordingly, defendant knowingly and voluntarily waived his right to a jury trial, and the trial court did not exhibit bias against defendant or in favor of the prosecution.

Defendant next argues that he was deprived of the effective assistance of trial counsel. We disagree.

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant first claims that his trial counsel was ineffective for erroneously convincing him to waive his right to a jury trial. Defendant claims that his waiver was not made knowingly because his counsel advised him of the benefits of a bench trial while failing to inform him that "in the County of Wayne, Bench Trials are preferred by the Prosecution and the Court, inherently giving the Prosecution an unfair advantage." First, such an assertion is unsubstantiated. Second, even if defendant could prove that the assertion is true, defendant's waiver of his right to a jury trial was voluntary and knowing, and such a finding is not undermined by the fact that defendant was unaware of the alleged benefit of a jury trial in Wayne County. The trial court complied with the procedural mandates of MCR 6.402(B) by informing defendant of his right to a jury trial, and ascertaining that defendant understood that right and knowingly and voluntarily waived it. Accordingly, because defendant's waiver was voluntary and knowingly, and in compliance with MCR 6.402(B), counsel's advice concerning the benefits of a bench trial does not constitute ineffective assistance.

We also reject defendant's argument that his trial counsel was ineffective for failing to adequately conduct a pretrial investigation. Specifically, defendant argues that counsel failed to interview and secure the trial presence of witnesses whom defendant informed counsel were important to his defense. When claiming ineffective assistance due to counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The failure to interview witnesses does not alone establish inadequate preparation. *Caballero*, *supra* at 642. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *Id.* Here, counsel investigated and secured at trial three defense witnesses who were at defendant's house during the victim's captivity and testified to their belief that the victim stayed at defendant's house willingly. The witnesses defendant argues counsel should have secured either would not provide exculpatory information or would present cumulative testimony. Additionally, decisions concerning what evidence to present, and whether to call or question witnesses, are presumed to be matters of trial strategy; this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Id.* Furthermore, although defendant maintains that counsel should have cross-examined the victim concerning her criminal record, which allegedly consists of assaultive convictions, the decision concerning what evidence

to present is a matter of trial strategy. *Rockey, supra* at 76. Thus, defendant cannot establish that his counsel failed to conduct an adequate pretrial investigation.

Defendant's argument that his counsel was ineffective for failing to object to the bias of the trial court judge, and to move for the recusal of the judge, is without merit. As we have already concluded, defendant's claim of bias is unsubstantiated. Counsel cannot be considered ineffective for failing to advocate a meritless position. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (counsel is not required to make a frivolous objection, or advocate a meritless position). In sum, defendant's arguments fail to establish prejudice and do not overcome the presumption that trial counsel's decisions were a matter of sound trial strategy.

Defendant's next claim is that he was deprived of the effective assistance of appellate counsel. We disagree. The standards that apply to ineffective assistance of trial counsel apply equally to a claim of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

As we have concluded, defendant was not deprived of the effective assistance of trial counsel and the trial court judge was not biased against defendant or in favor of the prosecution. Appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. Thus, appellate counsel was not ineffective for failing to seek recusal of the judge or raise the issue of ineffective assistance of counsel, as such arguments had little or no merit. *Knapp, supra* at 386.

Defendant also contends that his appellate counsel was ineffective for failing to move for an evidentiary hearing in the trial court for the purpose of establishing a record with respect to defendant's claims of ineffective assistance of trial counsel and judicial bias. However, defendant's claims of ineffective assistance of trial counsel and judicial bias are without merit. Even if an error can be shown, defendant cannot establish that, but for counsel's failure to request an evidentiary hearing, there is a reasonable probability that the outcome of the appeal would have been different. Accordingly, defendant failed to establish that he was deprived of the effective assistance of appellate counsel.

Finally, defendant asserts that he was denied a fair trial due to the cumulative effect of multiple errors. We disagree. A series of non-errors cannot aggregate to deny a defendant a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Here, defendant has failed to demonstrate the existence of any error, and therefore there can be no cumulative effect of errors warranting reversal. *Ackerman, supra* at 454. Consequently, the trial court did not err in denying defendant's motion for a new trial.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray